Supreme Court, U.S.
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No. 94-

In The

Supreme Court of the United States

October Term, 1994

CARL DIXON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a witness who repeatedly and successfully invokes his Fifth Amendment right and refuses to testify about an out-of-court statement when questioned by the prosecution on direct examination is "available" for cross-examination by the defendant about that out-of-court statement, as required by the Confrontation Clause of the Sixth Amendment.

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OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, Fourth Division, affirming Carl Dixon's conviction, is reproduced at App. 1-11.

STATEMENT OF JURISDICTION

Carl Dixon was convicted of murder on October 31, 1991. The Appellate Court of Illinois, First District, Fourth Division, affirmed the conviction on November 18, 1993 (App. 1-11), and denied Dixon's Petition for Rehearing on December 16, 1993. App. 14. The Illinois Supreme Court denied Leave to Appeal on April 6, 1994. App. 12. On June 26, 1994, Justice Stevens granted petitioner's motion to extend the time for filing a Petition for a Writ of Certiorari to July 26, 1994. App. 13.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * * ."

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United

States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * * ."

STATEMENT OF FACTS

Carl Dixon was convicted of murder based on what the trial court acknowledged to be very questionable evidence: an out-of-court statement made by one Christopher Carlisle. Carlisle had been brought in for police questioning after police arrived at the murder scene and found Carlisle standing next to the body of the victim, Patrick Marshall. Tr. A18-20. After a full day of questioning, Carlisle allegedly made a statement implicating Dixon. Tr. B16. At trial, however, Carlisle refused to answer any questions about this statement, invoking his Fifth Amendment privilege against self-incrimination. Tr. A61-64. Nonetheless, the trial court admitted the out-of-court statement over the objection of the defense. Tr. B10. The trial court recognized the significant legal issues involved in this case, though, and allowed Dixon to remain free on bond pending appeal. The court explained that the propriety of predicating a conviction on this sort of out-of-court statement "ought to be specifically addressed by" higher courts. Tr. B35.

A. The Testimony of Christopher Carlisle

On direct examination by the prosecution, Christopher Carlisle testified that he was with Patrick Marshall on the morning of May 12, 1990, when Marshall was shot and killed. Carlisle stated that he was standing with Marshall on the sidewalk when a green car pulled up to

the curb, someone jumped out of the car, and that person shot Marshall. Tr. A58. Carlisle testified that it was dark at the time of the incident and that he did not see the person who shot Marshall. He testified also that he did not know who owned the car. Tr. A58-59. This testimony – that Carlisle could not identify the killer – was entirely consistent with the information Carlisle gave the police when they arrived at the scene of the murder. See A25.

Carlisle's testimony offered no support to the prosecution's case against Carl Dixon. The prosecution proceeded, therefore, to ask Carlisle questions, using information derived from the alleged out-of-court statement Carlisle had given to Assistant State's Attorney David Studenroth the night after the murder of Patrick Marshall.

Q: Did you see Carl Dixon get out of the car?

A: No, I didn't.

Q: Did you see Carl Dixon walk up to Patrick?

A: No, sir.

Q: Did you see Carl Dixon with a gun in his hand?

A: No, sir.

Q: Did you hear Carl Dixon say, "Where is my shit at?"

A: No, sir.

Q: Did you hear Patrick respond, "I will get it to you, man."?

A: No, sir.

Q: Did you see Carl Dixon point that gun at Patrick and start firing several times at Patrick?

A: No, sir.

Q: Did you see Patrick run about a half block and collapse?

A: No, sir. (Tr. A60-61)

Following this testimony, the prosecution showed Carlisle the out-of-court statement he was alleged to have made to Assistant State's Attorney Studenroth. Tr. A61. Carlisle refused to answer any questions about the statement or its substance. In response to every question about the statement, Carlisle invoked his Fifth Amendment right against self-incrimination. And each and every time that Carlisle invoked this right, the trial court sustained Carlisle's claim that he need not answer any questions about the out-of-court statement that was being attributed to him:

Q: Is this the statement that you signed for the assistant state's attorney?

A: I plead the Fifth.

THE COURT: Sustained.

Q: Is that your signature on the bottom of the page?

A: I plead.

THE COURT: Sustained.

* * *

Q: "What did you tell the state's attorney?".

A: I plead the fifth.

THE COURT: Sustained (Tr. A61-64)

The only matter about which Carlisle was willing to testify with regard to his statement was the fact that he

was questioned by "a state's attorney" in the lobby of a police station about what he had seen on May 12, 1990. Tr. A62-63. Because Carlisle was successfully asserting his Fifth Amendment privilege in response to all questions about his May 12 statement (and because at that stage all of Carlisle's evidence was favorable to the defense), the defense asked no questions of Carlisle on cross-examination. Tr. A66.

B. Introduction of Carlisle's Out-Of-Court Statement

At this point in the case the prosecution was still without any evidence that could come close to supporting its charge against Carl Dixon. With its next witness, however, the prosecution sought to remedy this with the introduction of evidence relating to the substance of the out-of-court statement that Carlisle had allegedly made on May 12. The prosecution called Assistant State's Attorney David Studenroth to the stand and elicited testimony from him about the statement that he had taken from Christopher Carlisle at approximately 10:00 p.m. on May 12, 1990. Tr. B2-6. Over strenuous defense objections, Studenroth was allowed to testify about the contents of Carlisle's out-of-court statement. The following testimony about Carlisle's out-of-court statement[1] constituted the sole evidence upon which the court relied in convicting Dixon:

> Q: Mr. Studenroth, in that statement does Chris Carlisle state that he observed Carl Dixon get out of the car on May 12, 1990, 8125 South Manistee?

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[1] The State argued that the evidence was admissible as substantive evidence of guilt – not simply impeachment of Carlisle – under the terms of 725 ILCS 5/115-10.1. Tr. B6-B11.

A: Yes, it does.

Q: And that statement does it say Carl Dixon then walked toward – he – Chris Carlisle saying in that statement that he saw Carl Dixon walk toward Mr. Marshall?

A: Yes, he did.

Q: And that statement Chris Carlisle says to you that he saw Carl Dixon with a gun in his hand?

A: Yes, it does.

Q: In that statement does Chris Carlisle say that Carl Dixon at this time asked Patrick Marshall where's my shit at?

A: Yes.

Q: And in that statement does Carlisle say Patrick Marshall replied I'll get it to you man?

A: Yes.

Q: In that statement does Chris Carlisle say that he then observed Carl Dixon point the gun at Patrick Marshall and fire several times?

A: Yes, it does.

Q: And in that statement does Chris Carlisle say that he and Patrick Marshall then began running?

A: Yes, it does.

Q: And in that statement does it say that Chris – does Chris Carlisle say in that statement that I observed Patrick Marshall collapse after running about half a block?

A: Yes, it does. (Tr. B11-12)

The defense rested without recalling Carlisle to the stand for cross-examination. Because Carlisle had repeatedly and successfully invoked the Fifth Amendment to all questions relating to the statement, defense counsel recognized the futility and impropriety of recalling Carlisle to the stand when it was clear that he would successfully invoke the Fifth Amendment. As defense counsel explained to the court: "it was already stated by this Court that he was invoking, correctly so, his privilege against self-incrimination." Tr. C23.

C. The Trial Court's Verdict

In announcing its verdict, the trial court acknowledged that:

> absent Carlisle's impeachment there is no evidence connecting * * * Defendant with the acts which led to the death of Mr. Patrick [sic]. There is no direct evidence. There is circumstantial evidence. But that circumstantial evidence * * * just goes to the pointing of the existence [of a] motive, and the fact that Mr. Dixon was looking for the deceased after the events in that school yard. Tr. B33.

Nonetheless, relying solely on Carlisle's out-of-court statement – a statement about which the defense had no opportunity to cross-examine Carlisle – the trial court found Dixon guilty of first degree murder. Tr. B35. The court later denied Dixon's motion for a new trial and sentenced Carl Dixon to twenty years imprisonment. Tr. C3-26; D3-5. The trial court was, however, extremely

concerned about the legal questions associated with the admission of evidence about Carlisle's statements. Hence, the trial court allowed Dixon to remain free on bond pending appeal so that higher courts could consider the issues. Tr. B35.

D. The Appeals

The Appellate Court of Illinois, First Judicial District, Fourth Division, rejected Dixon's claim that the introduction of evidence about Carlisle's out-of-court statement violated Dixon's Sixth Amendment right of confrontation. See App. 10; Brief and Argument of Defendant-Appellant at 30-39. The Appellate Court ruled that Dixon's claim that he was unable to confront Carlisle about the out-of-court statement amounted to "speculation" because the defendant did not go through the formality of actually calling Carlisle to the stand after Carlisle had already asserted his Fifth Amendment right and refused to answer any and all questions relating to the out-of-court statement. App. 8. Even though Carlisle had repeatedly refused to testify about the statement on direct examination, the court held that Dixon could not "claim a lack of opportunity to cross-examine Carlisle when he did not even attempt to call Carlisle to the stand." App. 8. See also App. 10. The Illinois Supreme Court denied Dixon's Petition for Leave to Appeal. App. 12.

REASONS FOR GRANTING THE WRIT

The Court of Appeals in this case adopted an unreasonable rule for assessing whether an out-of-court declarant is "available" for cross-examination at trial. Contrary

to many of this Court's statements and the great majority of lower federal and state court holdings, the Illinois court ruled that a witness cannot be treated as "unavailable" based on his assertion of a Fifth Amendment privilege on direct examination unless the defendant calls the witness to the stand and forces the witness to invoke his Fifth Amendment privilege once again in response to cross-examination. The rule that the Illinois court announced in this case applies no matter how many times the witness has already been allowed to assert the privilege in the course of the proceeding and no matter how obvious it is that the witness will continue to assert the privilege.

The rule that the Illinois court adopted suffers from a number of infirmities. First, it artificially interferes with a defendant's Confrontation Clause rights by requiring the defendant to go through the wholly futile act of putting a witness on the stand when it is clear to all that the witness will continue to successfully invoke the Fifth Amendment and will refuse to testify. Worse yet, this rule places defense counsel in an appalling Catch-22. On the one hand, if defense counsel calls the witness to the stand – knowing full well that the witness has already invoked the privilege and will continue to invoke the privilege – then defense counsel has violated an established rule of trial procedure that prohibits counsel from calling a witness to the stand when it is known that the witness will properly refuse to testify. On the other hand, if defense counsel does not call the witness to the stand – thereby complying with the rule just mentioned – the court will assume that the witness was available for

cross-examination (and the violation of the defendant's right to confront witnesses will be ignored). It is essential that this Court grant this Petition for a Writ of Certiorari to rectify the glaring violation of Carl Dixon's right to confront witnesses, and to provide some much needed guidance to the lower courts, which continue to grapple with the standard for assessing when a witness is "available" for confrontation.

I. A WITNESS WHO HAS REPEATEDLY AND SUCCESSFULLY INVOKED HIS FIFTH AMENDMENT RIGHT TO REFUSE TO TESTIFY ON DIRECT EXAMINATION IS "UNAVAILABLE" FOR CONFRONTATION EVEN IF THE DEFENDANT DOES NOT GO THROUGH THE FUTILE AND ETHICALLY DUBIOUS FORMALITY OF FORCING THE WITNESS TO CONTINUOUSLY REPEAT HIS ASSERTION OF THE PRIVILEGE ON CROSS-EXAMINATION.

Nearly a century ago, this Court recognized that the "primary object" of the Confrontation Clause is to "prevent depositions or ex parte affidavits * * * being used against the prisoner in lieu of a personal examination and cross-examination of the witness." *Mattox* v. *United States*, 156 U.S. 237, 242 (1895); see also *California* v. *Green*, 399 U.S. 149, 156 (1970) (the "particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or depositions"). Indeed, the Court has recognized that "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the

right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965).

A. The Introduction Of An Out-Of-Court Statement About Which The Declarant Is Unavailable To Testify Is A Paradigmatic Violation Of A Defendant's Right To Confront The Witnesses Against Him.

In *Douglas* v. *Alabama*, 380 U.S. 415 (1965), this Court established the bedrock principle that a witness who invokes his or her Fifth Amendment right against self-incrimination is unavailable for cross-examination for purposes of the Sixth Amendment. In *Douglas*, a case much like this case, the prosecution called a witness named Loyd who repeatedly invoked his right against self-incrimination and refused to answer questions about his out-of-court confession which had implicated Douglas. (Loyd had already been tried for the crime). The prosecutor proceeded to read from the confession, pausing after every few sentences to ask the witness, "Did you make that statement." *Douglas*, 380 U.S. at 416. This Court was unanimous in condemning this practice: "petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Id.* at 419.

The principle of *Douglas*, as this Court explained in *Davis* v. *Alaska*, 415 U.S. 308 (1974), is based on the realization that the constitutional right to confront witnesses requires more than the mere opportunity to have the witness physically present on the stand:

> The opponent demands confrontation, *not for the idle purpose of gazing upon the witness, or of being gazed upon by him,* but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.

Id. at 316 (emphasis in original) (citing 5 J. Wigmore, *Evidence* § 1395, p. 123 (3d ed. 1940)). This Court and lower courts have consistently held that a defendant's inability to cross-examine a witness who invokes the Fifth Amendment "plainly denie[s] him" the Constitutional right to confront witnesses against him. *Lee* v. *Illinois*, 476 U.S. 530, 541 (1986) (quoting *Douglas*, 380 U.S. at 419).[2]

It is clear, then, that the introduction of Christopher Carlisle's out-of-court statement constituted a dramatic violation of Carl Dixon's right of confrontation.[3] As in

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[2] See generally *United States* v. *Flores*, 985 F.2d 770, 778 (5th Cir. 1993) ("the unavailability principle has been expanded to include a witness who, by the exercise of privilege, refused to testify") (citation omitted); *Rice v. Marshall*, 709 F.2d 1100, 1102 (6th Cir. 1983) ("it is clear that a witness is not 'available' for cross-examination when that witness refuses to testify"); *Thomas* v. *Cuyler*, 548 F.2d 460, 463 (3rd Cir. 1977) ("a witness who refuses to be sworn or to testify at all or one who, having been sworn, declines to testify on Fifth Amendment grounds, has not been thus made available for cross-examination"); *Robinson v. State*, 102 Wis. 2d 343, 349, 306 N.W.2d 668, 671 (Wis. 1981) ("Where a witness avails himself of his fifth amendment rights, confrontation is denied").

[3] This is not a case in which other "indicia of reliability" overcome the constitutional prohibition on admitting evidence about which the defendant has no opportunity to engage in cross-examination. See *Ohio* v. *Roberts*, 448 U.S. 56 (1980). Neither the prosecution nor any of the lower courts have ever

Douglas, an out-of-court statement was used to convict a defendant even though the defendant had no opportunity to examine the declarant about the statement. The only way that the Illinois court could affirm Dixon's conviction was to apply a grudging standard for assessing Confrontation Clause claims and thereby hold that Carlisle's unavailability for cross-examination was somehow speculative. As will be seen, however, there was nothing at all speculative about Carlisle's unavailability, and the rule that the Illinois court applied cannot survive scrutiny.

B. A Defendant Need Not Perform The Futile Act Of Trying To Cross-Examine A Witness Who Already Has Unequivocally And Successfully Invoked His Privilege To Refuse To Testify.

The overwhelming majority of courts have recognized that assessing a witness's availability for confrontation is a functional – not a formalistic – inquiry. When it is

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advanced that claim in this case, and there is no evidence to support any contention that Christopher Carlisle's self-serving statement to police, while Carlisle himself was being questioned as a suspect, contained any special indicia of reliability. See generally *Lee* v. *Illinois*, 476 U.S. 530, 541 (1986) ("when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination"); *Mayes* v. *Sowders*, 621 F.2d 850, 856 (6th Cir. 1980) (self-serving statement by suspect under questioning lacks any special, inherent reliability). Nor is this a case in which any prior opportunity to cross-examine the declarant satisfied Dixon's rights under the Confrontation Clause. See *California* v. *Green*, 399 U.S. 149 (1970).

obvious that the witness will invoke his Fifth Amendment right and refuse to testify, courts have had no difficulty in declaring the witness unavailable and have not required that the witness be physically called to the stand and forced to invoke or re-invoke the privilege. Many of these cases have involved "unavailability" under the Confrontation Clause; others have involved "unavailability" with regard to rules of evidence similar to Federal Rule of Evidence 804.[4] In both contexts, however, the great majority of courts, including this Court, have consistently eschewed any requirement that the witness be forced to formally invoke, much less re-invoke, the Fifth Amendment as a condition of showing unavailability.

This Court's approach to this question has not yet been the subject of a square holding (which is the reason, of course, that granting this Petition for a Writ of Certiorari is appropriate). A number of this Court's decisions reveal, though, that this Court has never required anything close to a formal assertion, much less re-assertion, of the Fifth Amendment as a condition of finding a witness unavailable.

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[4] Rule 804(b) provides that certain types of out-of-court statements "are not excluded by the hearsay rule if the declarant is unavailable as a witness." It should be noted that cases adopting a functional inquiry in applying Rule 804, which requires that the witness "be exempted by ruling of the court on the ground of privilege," are especially persuasive authorities with regard to the Confrontation Clause, which contains no such precise requirement that "unavailability" be based on the witness's having been exempted from testifying by a "ruling of the court."

For example, in *Douglas*, the witness, Loyd, had been called to the stand by the prosecution and had repeatedly asserted his Fifth Amendment right on direct examination when asked about his out-of-court statement. The defendant, Douglas, made no effort to call Loyd to the stand to pursue cross-examination about the statement. See *Douglas* v. *Alabama*, Record at 131-132. Yet, this Court held, without apparent reservation, that Loyd was unavailable for cross-examination and that the references to his out-of-court statements violated Douglas's rights under the Confrontation Clause. (Of course, under the approach applied by the Illinois court in this case, Loyd's unavailability on cross-examination would have been deemed "speculative" because Douglas never formally called Loyd to the stand and never forced him to re-invoke on cross-examination the privilege that he had already invoked repeatedly on direct examination.)

Similarly, in *Lee* v. *Illinois*, the prosecution introduced the out-of-court statement of defendant Thomas as evidence against defendant Lee. In support of its finding that defendant Lee was not able "to confront and cross-examine" Thomas, this Court observed simply that "neither defendant testified at trial." *Lee*, 476 U.S. at 536. The Court most certainly did not require Lee to call Thomas to the stand in order to demonstrate what was already obvious – that Thomas had chosen to invoke his Fifth Amendment right.

The dissent in *Lee* was even more explicit on this point. The four dissenters in *Lee* agreed that Thomas was " 'unavailable' as a witness." *Id.* at 549 (Blackmun, J., with whom Burger, C.J., and Powell & Rehnquist, JJ.,

joined, dissenting).[5] In support of this conclusion, the dissenters explained that "[a]lthough physically present in the courtroom, [Thomas] *clearly would have* invoked his privilege against self-incrimination if called to the stand." *Id.* at 549 (emphasis added). The dissenters explained further that "[b]ecause the State did not call Thomas to testify, he did not expressly invoke his Fifth Amendment privilege. In the circumstances of this case, however, *the absence of this formality is not decisive*," in large part because "such an effort" would "have been futile." *Id.* at 549 n.3. (emphasis added) This analysis is a far cry from the demand for elaborate formality that the Illinois court imposed here.

One further example of this Court's functional approach can be gleaned from the Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968). In holding that the introduction of the out-of-court statement of defendant Evans violated the Confrontation Clause rights of defendant Bruton, the Court observed that the statement was introduced "in a form not subject to cross-examination, since Evans did not take the stand." *Id.* at 128. Here, again, the Court did not demand that Bruton go through the futile act of actually calling Evans to the stand in order to show that Evans would refuse to testify. As this Court stated in *Ohio* v. *Roberts*, 448 U.S 56, 74 (1980): "The law does not require the doing of a futile act."

This Court's decisions in *Douglas*, *Lee*, and *Bruton* reveal how far removed the Illinois court's approach is

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[5] The dissent in *Lee* argued that the evidence was, nonetheless, sufficiently reliable to be admitted. 476 U.S. at 551-557. That theory of admissibility has no relevance to Carlisle's statement. See *supra*, note 3.

from the approach that this Court has consistently followed. A review of the decisions of various federal courts of appeals and state courts similarly reveals that the Illinois court's approach is out of step with the majority position.

For example, in *United States* v. *Adams*, 759 F.2d 1099 (3d Cir. 1985), a potential witness's counsel made clear that the witness would invoke the privilege and refuse to testify if called to the stand. The court held that the witness was clearly unavailable and explained that "the confrontation clause does not require the futile act of calling [a witness] to the stand in open court to testify only to have him refuse." *Id.* at 1107. Similarly, in *State* v. *Hansen*, 312 N.W.2d 96 (Minn. 1981), two witnesses who had given out-of-court statements refused to testify about the statement when called on direct examination. In holding that admission of the out-of-court statements violated the defendant's Confrontation Clause rights, the Minnesota Supreme Court recognized that the defendant did not try to call the witnesses to the stand for cross-examination. Nonetheless, the court held that the witnesses were clearly unavailable for cross-examination because any "attempt at cross-examination would have been futile." *Id.* at 103 n.5.

Many other courts have used this same approach and have conducted a practical inquiry into whether the witness was available. See, *e.g.*, *United States* v. *Flores*, 985 F.2d 770, 774 n.9 (5th Cir. 1993) (witness was unavailable for cross-examination even though "he did not personally utter the magic words or take the stand"); *United States* v. *Harrell*, 788 F.2d 1524, 1526 (11th Cir. 1986) (witnesses were unavailable in case in which they were defendants

and "were privileged against testifying"); *United States* v. *Brainard*, 690 F.2d 1117, 1123 (4th Cir. 1982) (declining "to require the defense actually to produce [the witness] and obtain a formal ruling on his assertion of the privilege" when doing so would constitute "mere formalism"); *United States* v. *Thomas*, 571 F.2d 285, 288 (5th Cir. 1978) (rejecting "mere formalism" of requiring co-defendant to assert privilege in court when it was "patent" that the co-defendant would successfully assert the privilege); *State* v. *Smith*, 415 A.2d 553, 559 (1980) (unavailability was shown where the witness "stated that she would invoke her Fifth Amendment privilege against self-incrimination if called to testify at defendant's trial").

On the other hand, a number of courts have applied a standard much closer to the standard that the Illinois court applied in this case. For example, in *United States* v. *Pelton*, 578 F.2d 701 (8th Cir. 1978), the court held that the witness could not be deemed unavailable because the witness had not stated "firsthand and in the court's presence that she did intend to refuse to testify in reliance on her fifth amendment privilege." *Id.* at 709. Similarly, in *United States* v. *Salerno*, 868 F.2d 524, 542 n.8 (2nd Cir. 1989), the court adopted the *Pelton* approach and ruled that a formal assertion of privilege is necessary to show unavailability. See generally *United States* v. *Oropeza*, 564 F.2d 316, 325 n.8 (9th Cir. 1977) ("express claim of privilege and a ruling thereon should be made"); *People* v. *Rosenthal*, 670 P.2d 1254, 1256 (Colo. Ct. App. 1983) ("declarant must actually invoke the privilege before the trial court, and the trial court must rule that the privilege is available").

The conflict among lower courts that we have described is a real one, and a decision by this Court would provide much needed guidance in this area. It must be noted, however, that no court – even those requiring a more formal in-court assertion of the Fifth Amendment as a condition of declaring a witness unavailable – has ever gone so far down the road of requiring futile formalism as the Illinois court did in this case.

Here, Christopher Carlisle *did* take the stand, and Carlisle *did* invoke his privilege in response to every question about his out-of-court statement, and the trial court *did* hold that Carlisle was properly invoking the privilege. See *supra* 4-5. It is simply irrational to require a defendant, after all that, to call the witness to the stand once again and to ask those same questions all over again. The Illinois court created an unreasonable and unprecedented rule in order to avoid the result that the Constitution so obviously compels here: Carl Dixon's Sixth Amendment rights were violated by the admission of an unreliable out-of-court statement that he had no opportunity to confront. Mr. Dixon asks this Court to use this opportunity to right this wrong, while at the same time providing the lower courts with guidance on these recurring legal issues.

C. Requiring The Defendant To Call A Witness To The Stand When It Is Obvious That The Witness Will Invoke The Privilege Against Self-Incrimination Violates Settled Rules Of Procedure And Ethics Governing The Conduct Of Trials.

As we have explained, the rule that the Illinois court imposed here senselessly requires a defendant to undertake the futile act of recalling a witness to the stand, even though it is beyond question that the witness will continue to refuse to testify. Worse than being senseless, though, the rule is also offensive to fundamental principles of trial procedure and trial ethics.

Established principles of trial procedure provide that a "defendant does not have the right to call a witness to the stand simply to force invocation of the right against self-incrimination." *United States* v. *Swanson*, 9 F.3d 1354, 1359 (8th Cir. 1993) (quoting *United States* v. *Doddington*, 822 F.2d 818, 822 (8th Cir. 1987)). See generally *United States* v. *Lyons*, 703 F.2d 815, 818 (5th Cir. 1983) ("if the judge sustains a witness' assertion of the privilege, the defendant has no right to call the witness to the stand") (citing cases); *United States* v. *Martin*, 526 F.2d 485, 487 (10th Cir. 1975) (judge properly refused to allow counsel to call witness to the stand when "all concerned knew full well that the informant intended to invoke his Fifth Amendment right not to testify. He had already done so successfully at the first trial"); *People* v. *Nally*, 134 Ill. App. 3d 865, 869-870, 480 N.E.2d 1373, 1378 (Ill. App. Ct. 1985) ("it is improper for a party to call a witness whom he has reason to believe will invoke this privilege"); *Michigan* v. *Dyer*, 425 Mich. 572, 576, 390 N.W.2d 645, 647

(Mich. 1986) ("the rule of law remains the same: a lawyer may not knowingly * * * call a witness knowing that he will claim a valid privilege not to testify").

This rule has a significant ethical component as well. The American Bar Association's Standards Relating To The Administration Of Criminal Justice provide that "defense counsel shall not call a witness in the presence of the jury who the lawyer knows will claim a valid privilege not to testify." Defense Function Standard 4-7.6; see also Prosecution Function Standard 3-5.7.[6]

When these legal principles and ethical mandates are combined with the rule that the Illinois court imposed in this case, the defense is placed in an unworkable Catch-22. On the one hand, it is improper to call a witness who will clearly invoke his Fifth Amendment right (a witness like Christopher Carlisle who had already taken the Fifth successfully on direct examination). On the other hand, the Illinois court has now held that complying with the rules of ethics and trial procedure (and declining to call such a witness) forecloses a defendant's opportunity to show that a witness was "unavailable" for cross-examination. Some guidance from this Court is badly needed.

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[6] Carl Dixon was tried in a bench trial, but the Confrontation Clause surely does not incorporate a different definition of unavailability for bench and jury trials.

D. The Witness In This Case Unequivocally Asserted His Fifth Amendment Right And Refused To Testify On The Material Issues Surrounding The Out-Of-Court Statements That Were Admitted.

The fact that Christopher Carlisle was willing to testify about matters not related to his out-of-court statement did not, in any sense, satisfy Carl Dixon's right to confront Carlisle about the out-of-court statement that was used to convict Dixon. Carlisle's out-of-court statement could not constitutionally be admitted as substantive evidence against Dixon unless Dixon was provided an "opportunity for effective cross-examination" on the full range of issues related to the out-of-court statement. See *United States* v. *Owens*, 484 U.S. 554, 559 (1988). The restrictions imposed on cross-examination by virtue of Carlisle's invoking the Fifth Amendment on issues relating to the most potentially incriminating evidence in the prosecution's case served to "effectively * * * emasculate the right of cross-examination itself." *Delaware* v. *Fensterer*, 474 U.S. 15, 19 (1985).

As the trial court noted, Carlisle's out-of-court statement constituted the only evidence that, if believed, truly incriminated Carl Dixon. Tr. B33. *Cf. Douglas*, 380 U.S. at 419 (the unavailable witness's "alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so"). Yet, Carlisle refused to be examined on any matters related to the statement.[7]

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[7] This is not a case like *United States* v. *Owens*, 484 U.S. 554 (1988), or *Nelson* v. *O'Neil*, 402 U.S. 622 (1971), in which a witness did testify, but testified in a manner that frustrated the

Invoking his Fifth Amendment right not to admit that he lied to the authorities when he implicated Dixon on May 12, Carlisle repeatedly: (a) refused to answer any questions relating to whether he actually made the statement; (b) refused to answer any questions relating to whether he signed the statement; (c) refused to answer any questions about things he said or did not say to the State's Attorney.

The devastating effect that Carlisle's invocation of his right against self-incrimination[8] had on Dixon's defense cannot be overstated. The only way to defend Carl Dixon was to convince the trier of fact that the statement that Carlisle allegedly made on the night after the murder was false. The only way to defend Carl Dixon was to ask Carlisle about whether he, in fact, made the statement and, if so, what motives he had in making it. For example, constitutionally adequate cross-examination would have included, among other questions, questions about: (a) whether Carlisle made or signed the statement at all;

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defendant's goals on cross-examination. Those cases raised no Confrontation Clause problems because the witnesses were available, in every sense of the word, to be confronted. Nothing stopped the defendant in those cases from asking any questions they wanted, and the witnesses were compelled to answer all questions. Here, by contrast (as in *Douglas* and *Lee*), the witness was not available, by virtue of a legal barrier as formidable as any physical barrier, to answer the questions that the defendant needed to have answered.

[8] The trial court repeatedly upheld Carlisle's right to assert his privilege. It is, of course, immaterial whether the judge was correct in allowing Carlisle to assert his Fifth Amendment right. See *Douglas*, 380 U.S. at 420.

(b) whether Carlisle made the statement that night because he himself was a suspect in the murder and because he had been told that if he signed the statement he would be allowed to go home that evening; and (c) whether he made the statement because he held some grudge against Carl Dixon. See generally II A. Amsterdam, *Trial Manual For The Defense Of Criminal Cases* §§ 378-384 (1984). Carl Dixon was stripped of his right to confront Carlisle with these critical questions – questions upon which Dixon's freedom turned – when Carlisle refused to answer any and all questions about the May 12 statement.[9]

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[9] It is obvious that the questions that the defense was precluded from putting to Carlisle went to the heart of the matter at issue here; they were in no sense "collateral" to the damaging evidence about Carlisle's statement that was introduced. Under these circumstances, courts have recognized universally the constitutional impropriety of admitting evidence about which the defendant is precluded from engaging in cross-examination. See generally *United States* v. *Berrio-Lodono*, 946 F.2d 158, 160 (1st Cir. 1991) (Confrontation Clause precludes introduction of testimony if witness refuses to be examined with "respect to a material issue" related to the testimony); *United States* v. *Seifert*, 648 F.2d 557, 561 (9th Cir. 1980) (issue is whether "answers to particular questions would have * * * undermined the government's case") (citation omitted); *Mayes* v. *Sowders*, 621 F.2d 850, 854 (6th Cir. 1980) (although the witness was available for cross-examination on some issues, the witness "could not be considered to be available for the kind of full and effective cross-examination which would allow the prosecution to introduce his out-of-court statements"); *Fountain* v. *United States*, 384 F.2d 624, 628 (5th Cir. 1968) (issue is "whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth" of the evidence); (*United States* v. *Cardillo*, 316 F.2d 606, 611 (2nd Cir. 1963) (distinguishing material limitation on cross-examination from limitations relating to "collateral matters").

The fact that the witness can be cross-examined on *some subjects* is not enough[10]; the issue is whether the witness can be cross-examined on the constitutionally *material subjects*. It is patently unconstitutional to admit evidence against a defendant when the defense is prevented from placing facts before the trier of fact "from which bias, prejudice, or lack of credibility of a prosecution witness may be inferred." *United States* v. *LaRiche*, 549 F.2d 1088, 1096 (6th Cir. 1977). This is precisely what the State of Illinois has done to Carl Dixon.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari.

Alternatively, in the event that the Court believes that the violation of Carl Dixon's right of confrontation is so manifest that this case does not merit plenary consideration, petitioner respectfully asks the Court to summarily reverse the judgment below. It would be most unjust to require Carl Dixon to wait several years in

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[10] Nor does the fact that the defendant had the opportunity (and took the opportunity) to cross-examine the law enforcement officer who took the statement from Carlisle satisfy the demands of the Confrontation Clause. As this Court stated in *Douglas*, the chance to cross-examine the person who took the statement and inquire about the statement's "genuiness could not substitute for cross-examination of [the out-of-court declarant] to test the truth of the statement itself." 380 U.S. at 420.

prison, pending review on federal habeas corpus, precisely because the errors surrounding his conviction are so obvious. Moreover, various proposed and current limitations on habeas corpus relief make it imperative that this Court use the mechanism of direct review to remedy the egregious constitutional wrong that Carl Dixon has suffered.

Respectfully submitted

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JULY 26, 1994

FOURTH DIVISION
FILED: 11/18/93

No. 1-92-1075

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
v.	)	
CARL DIXON, Defendant-Appellant.	)	HONORABLE EARL E. STRAYHORN, PRESIDING.

JUSTICE JOHNSON delivered the opinion of the court:

After a bench trial in the circuit court of Cook County, defendant, Carl Dixon, was convicted of first degree murder (Ill.Rev.Stat.1987, ch. 38, par. 9-1(a), now 720 ILCS 5/9-1(a) (West 1992)), and sentenced to 20 years of imprisonment in the Illinois Department of Corrections.

On appeal, defendant contends (1) the trial court erroneously admitted the prior inconsistent statement of a State's witness for substantive purposes when the statement did not meet the requirements of section 115-10.1 of the Code of Criminal Procedure (hereinafter the Code) (Ill.Rev.Stat.1989, ch. 38, par. 115-10.1, now 725 ILCS 5/115-10.1 (West 1992)); (2) a witness' assertion of his fifth amendment right against self-incrimination in response to questions pertaining to the prior inconsistent statement denied him his right to confront witnesses

against him; (3) he was not proved guilty beyond a reasonable doubt; and (4) the trial court erroneously denied both his motion for a directed verdict and his motion for a new trial as the evidence was insufficient to prove him guilty beyond a reasonable doubt.

We affirm.

The following pertinent facts were adduced at trial. Officer Darryl Cavin testified that, on the morning of May 12, 1990, he responded to a call regarding a shooting. Upon arriving at the scene, he observed a man lying in the crosswalk of the street with his face down. Officer Cavin stated that he questioned Christopher Carlisle, one of the individuals at the scene. Carlisle told him that the victim's name was Patrick Marshall and that a man ran up behind Patrick and fired three shots.

Ashadu McPherson, the victim's cousin, testified that on the night of May 11, 1990, he was with Patrick Marshall, defendant, Omar Norman, and Christopher Carlisle. McPherson stated that defendant was showing the group of men a black .9 millimeter gun which they passed amongst themselves. As the gun was passed, Marshall ran from the group apparently having taken defendant's gun. Defendant then ran to his house and emerged with a shotgun. He put the shotgun in the trunk of his car and drove around with McPherson and Norman looking for Marshall whom he believed had taken his gun.

As they drove around, defendant told McPherson to get his gun back. McPherson assured defendant that he would get the gun back and then got out of the car. Later that evening, McPherson met up with defendant again

and observed a .22-caliber or a .25-caliber gun in defendant's lap. While they were in the car, defendant said, "Tell Pat to give me my gun" and "If you don't give me my gun, I am going to have to do something to him." McPherson told defendant that he would get his gun back and defendant then dropped off McPherson. McPherson later called home and learned that Marshall had been killed.

At trial, Christopher Carlisle, a friend of both defendant and Patrick Marshall, testified that he was with Marshall on May 12, 1990, but denied many of the facts pertaining to the crime included in a statement he had given to Assistant State's Attorney David Studenroth which directly implicated defendant in the killing. When specifically asked about what he told Studenroth, Carlisle exercised his fifth amendment right against self-incrimination. Carlisle was also shown a copy of the statement and when asked whether the signature at the bottom was his, he again asserted the fifth amendment. Defense counsel chose not to cross-examine Carlisle.

The State then called Assistant State's Attorney Studenroth to the stand who testified that Carlisle gave a three page statement to him regarding Marshall's killing. Subsequent to making the statement, Studenroth observed Carlisle read it and sign each page at the bottom. The statement revealed that Carlisle saw defendant walk toward Marshall with a gun in his hand. Defendant then asked Marshall, "Where's my shit at," and Marshall replied, "I'll get it to you man." The statement further indicated that Carlisle then saw defendant point a gun at Marshall and fire several times. At the conclusion of this testimony, defense counsel chose not to recall Carlisle.

After argument in aggravation and mitigation, defendant was convicted of first degree murder and sentenced to 20 years in the Illinois Department of Corrections. The trial court also sentenced defendant to a 7-year term of imprisonment for violating his probation on a burglary conviction to be served concurrently with the murder sentence. Defendant appeals.

Initially, defendant maintains that the trial court improperly admitted the prior inconsistent statement of Christopher Carlisle as substantive evidence because the statement did not meet the admissibility requirements of section 115-10.1 of the Code. We do not agree.

Section 115-10.1 of the Code provides in pertinent part:

> "Admissibility of prior inconsistent statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement –
>
> (1) was made under oath at a trial, hearing or proceeding, or
>
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, * * * ." 725 ILCS 5/115-10.1 (West 1992).

For the reasons which follow, Carlisle's statement was properly admitted into evidence.

The first admissibility requirement is that the witness' prior statement must be inconsistent with the testimony he gives at trial. On direct examination, the following colloquy occurred between the prosecutor and Carlisle:

"Q Did you see Carl Dixon get out of the car?

A No, I didn't.

Q Did you see Carl Dixon walk up to Patrick?

A No, sir.

Q Did you see Carl Dixon with a gun in his hand?

A No, sir.

Q Did you hear Carl Dixon say, 'Where is my shit at?'

A No, sir.

Q Did you hear Patrick respond, 'I'll get it to you, man.'?

A No, sir.

Q Did you see Carl Dixon point that gun at Patrick and start firing several times at Patrick?

A No, sir.

Q Did you see Patrick run about a half block and collapse?

A No, sir."

At this point, the prosecutor showed Carlisle the statement he gave to Assistant State's Attorney Studenroth on the day of the killing. Carlisle stated that he recognized it to be a statement. When asked if it was the statement he gave to the assistant State's Attorney, he replied, "I plead the fifth." He was then asked if his signature appeared at the bottom of the page and again he invoked his fifth amendment privilege. The trial court allowed him to utilize this privilege in each of these instances.

The next day, the State called Assistant State's Attorney Studenroth to the stand who testified that he interviewed Carlisle and took his statement. He stated that after he wrote out the statement, he reviewed it with Carlisle "word for word, page by page." Carlisle then signed his name at the bottom of each page as did Studenroth and two police detectives.

After both sides were heard as to the admissibility of Carlisle's statement as a prior inconsistent statement under section 115-10.1, the trial court stated, "I am going to permit it[,] [o]n the basis that this statement is inconsistent with what he testified to yesterday[,] [w]hen these questions were put to him specifically." Therefore, only the portions of Carlisle's statement that directly contradicted his previous testimony were allowed into evidence.

The statement's relevant contents revealed that Carlisle saw defendant get out of the car and walk toward the

victim. He saw defendant with a gun in his hand and heard him ask Marshall, "Where's my shit at?" He also heard Marshall reply, "I'll get it to you man." The statement further reveals that Carlisle saw defendant point the gun at Marshall and fire several times. It also indicates that, after the shooting, Carlisle and the victim began to run. Finally, it states that Carlisle observed the victim collapse after running about 1/2 block.

Defendant now argues that Carlisle's out-of-court statement could not have been inconsistent with his testimony at trial because he invoked his fifth amendment privilege. We disagree.

Defendant was not able to invoke his fifth amendment privilege in all instances and did testify substantively as to his knowledge of the events surrounding the killing of Patrick Marshall. As previously established, Carlisle responded to substantive questions posed by the prosecutor effectively denying the information he gave to Assistant State's Attorney Studenroth. Clearly, the portions of Carlisle's statement were in direct contradiction to his testimony at trial and are, therefore, inconsistent.

Defendant urges us to liken this case to People v. Redd (1990), 135 Ill. 2d 252, when the two are in fact incongruous. In Redd, the witness in question successfully invoked the fifth amendment privilege throughout his entire testimony and failed to answer any questions. The trial court then permitted the introduction of the witness' prior testimony reasoning, "I interpreted [section 115-10.1] to mean that when someone takes the fifth amendment, that is the same as being inconsistent with his testimony at the hearing or trial or in fact as to

the Grand Jury." (Redd, 135 Ill. 2d at 302.) Our supreme court concluded that since the witness did not testify, "it was error to allow him to be impeached by prior statements allegedly made by him * * * ." Redd, 135 Ill. 2d at 317.

Our situation here is dissimilar. Carlisle repeatedly tried to invoke the fifth amendment privilege and the trial court determined, instance by instance, whether he had a valid privilege to invoke. Thus, Carlisle was allowed to take the fifth as to some questions but not as to others. Consequently, unlike Redd and as previously illustrated, he did provide substantive testimony and specific answers to questions posed to him at trial.

We believe portions of Carlisle's statement were properly admitted as substantive evidence because they were in direct contradiction to his prior testimony and inconsistent in accordance with section 115-10.1 of the Code of Criminal Procedure.

The second element of section 115.10.1 requires that the witness must be available for cross-examination concerning his prior statement. This requirement was unequivocally satisfied. At the conclusion of Carlisle's direct examination testimony, the trial court inquired as to whether defense counsel wanted to cross-examine Carlisle. Defense counsel responded, " No cross, your Honor." Defense counsel, then, had the full opportunity to cross-examine Carlisle who was readily available. This is all section 115-10.1 mandates.

Defendant argues that, because Carlisle invoked his fifth amendment privilege on direct examination, he

would have been unavailable to testify on cross-examination. As previously elucidated, Carlisle did testify substantively at trial and defense counsel decided not to cross-examine him presumably because his testimony was favorable to defendant.

This contention further assumes that Carlisle would have asserted his fifth amendment privilege when cross-examined by defense counsel. This, of course, is speculation. Defendant cannot claim a lack of opportunity to cross-examine Carlisle when he did not even attempt to call Carlisle to the stand.

We also reject defendant's assertion that he could not effectively cross-examine Carlisle or challenge the truth of his statement because Carlisle was not on the stand when the statement was admitted into evidence. After Carlisle's prior statement was introduced by Assistant State's Attorney Studenroth, defense counsel specifically asked the trial court if he could recall Carlisle as a rebuttal witness. The trial court granted this request. If necessary, then, defense counsel had the option of recalling Carlisle to rebut the assistant State's Attorney's testimony. Carlisle was thus available to be cross-examined within the meaning of section 115-10.1.

Third, the witness' statement must have been signed by him and must narrate an event within his personal knowledge. Assistant State's Attorney Studenroth testified that he took Carlisle's statement, and saw him read and sign each page of it. At trial, Studenroth identified the statement as the one which he had written and seen Carlisle sign. We believe that, although Carlisle took the fifth when he was shown the statement and asked if it

was his, the testimony of Studenroth is sufficient proof that the statement was made and signed by Carlisle. As the final requirement of section 115-10.1 was satisfied, the trial court did not err in admitting Carlisle's prior inconsistent statement into evidence.

Next, defendant submits that Carlisle's invocation of his fifth amendment privilege against self-incrimination, when asked about the prior inconsistent statement, made him unavailable for cross-examination violating the Confrontation Clause of the sixth amendment. In view of our previous discussion, this issue fails to warrant much attention.

"The Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (United States v. Owens (1988), 484 U.S. 554, 559, 98 L. Ed. 2d 951, 957-58; 108 S. Ct. 838, 842; see People v. Flores (1989), 128 Ill. 2d 66.) As defendant had the opportunity to cross-examine Carlisle, his right to confront witnesses was not violated.

Next, defendant contends that he was not proved guilty beyond a reasonable doubt. "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt." (Jackson v. Virginia (1979), 443 U.S. 307, 318, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781, 2788; see People v. Young (1989), 128 Ill. 2d 1.) We believe, based on the evidence presented in the light most favorable to the prosecution, that a rational trier of fact could

have found defendant guilty of first degree murder beyond a reasonable doubt.

Finally, defendant opines that the trial court erroneously denied both his motion for a directed verdict and his motion for a new trial. In furtherance of this position, defendant points solely to the trial court's improper admission of Carlisle's prior inconsistent statement as substantive evidence. We have already determined that the statement was properly admitted.

In ruling on a motion for a directed verdict, "the trial court need consider only whether a reasonable mind could fairly conclude beyond a reasonable doubt the defendant is guilty, considering the evidence most strongly in the People's favor." (People v. Huffman (1988), 177 Ill. App. 3d 713, 722-23.) We believe application of the above standard to this case supports the trial court's denial of defendant's motion for a directed verdict.

The appropriate standard of review for the denial of a motion for a new trial is as follows:

> "The decision of a trial court to grant a new trial is an exercise of discretion which should not be disturbed unless a clear abuse of that discretion is shown. [Citations.] In determining whether that discretion was abused, the reviewing court will consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial." Reidelberger v. Highland Body Shop, Inc. (1981), 83 Ill. 2d 545, 548-49.

Based on our thorough review of the record, we do not believe the trial court abused its discretion in denying defendant's motion for a new trial.

For the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

CAHILL, P.J., and HOFFMAN, J., concur.

SUPREME COURT OF ILLINOIS

WEDNESDAY, APRIL 6, 1994

THE FOLLOWING CASES ON THE LEAVE TO APPEAL DOCKET ARE DISPOSED OF AS INDICATED:

No. 76732 – People State of Illinois, respondent, v. Carl Dixon, petitioner. Leave to appeal, Appellate Court, First District. (1-92-1075)

Petition for leave to appeal denied.

Supreme Court of the United States

No.

A-1079

Carl Dixon,

Petitioner

v.

Illinois

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including

July 26, 1994.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 24th
day of June, 1994.

ORDER

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	NO. 1-92-1075
v.	)	
C.[illegible]L DIXON, Defendant-Appellant.	)	

ORDER

This cause coming on to be heard on Petition for Rehearing, and the Court now being fully advised in the premises:

IT IS ORDERED that said Petition for Rehearing be and the same is hereby denied.

DATED: December 16, 1993

Name

Attorney for

Address

City

Telephone

/s Glenn T. Johnson
Justice

/s Robert Cahill
Justice

/s Thomas E. Hoffman
Justice

GILBERT S. MARCHMAN, CLERK OF THE APPELLATE COURT, FIRST DISTRICT